1989

State of Utah v. Chad A. Gardiner : Reply Brief

Utah Court of Appeals

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BRIEF

IN THE UTAH SUPREME COURT

STATE OF UTAH, :

Plaintiff/Respondent, : Case. No. 890231
Category No. 13

vs. :

CHAD A. GARDINER, :

Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

AN APPEAL ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
AFFIRMING DEFENDANT'S CONVICTION ENTERED IN THE
EIGHTH CIRCUIT COURT OF UINTAH COUNTY, STATE OF UTAH
The Honorable A. Lynn Payne, Presiding

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SUMMARY OF ARGUMENT

The State's attempt to assert defendant's lack of standing should be summarily disregarded because this issue was raised for the first time on appeal. Even if the Court considers the standing issue, under Rakas v. Illinois and Jones v. United States, defendant has standing because he was legitimately on the premises with the permission of his father, and he has an expectancy of privacy due to his ties to the business.

The chief issue presented in this appeal: the right to forcibly resist an unlawful search of an area protected by the Fourth Amendment is governed by State v. Bradshaw, 541

P.2d 800 (Utah 1975) The Bradshaw court recognized and affirmed the common law rule that one can use force to resist an unlawful arrest. The State's attempt to distinguish Bradshaw as dicta ignores the fact that the language "regardless of whether there was a legal basis for the arrest" was central to the Court's decision. Bradshaw is therefore dispositive to this appeal.

Moreover, the Court should not modify Bradshaw due to considerations of expediency. Bradshaw and the common law rule stand for the proposition that a law abiding citizen should not be punished for refusing to acquiesce in an illegal search. The rule prevents an officer acting illegally from goading a citizen into a crime, which, if the officer had acted legally, would not have occurred.

Even if the Court modifies the right to resist an unlawful search to the Elson rule, the defendant is entitled to a judgment of acquittal because the officer used unnecessary force. Specifically, the officer failed to verbally warn the defendant of the consequences of his refusal to allow the officer to enter the building before using force. The officer resorted to force immediately and without provocation thereby causing the incident. Under Elson, defendant's use of force is justified because the officer used force when unnecessary.

ARGUMENT

POINT I

THE STATE'S FAILURE TO DISTINGUISH STATE V. BRADSHAW REQUIRES REVERSAL OF DEFENDANT APPELLANT'S CONVICTION AS A MATTER OF LAW.

A. State waived its objection to defendant's standing by failing to raise the objection at trial.

The State concedes that the Court of Appeals correctly held that the officer's warrantless entry into the Dinaland Aviation hanger was illegal. (See Respondent's Brief, p. 17 n.8) The only issue raised as to the illegality of the search is the defendant's standing to assert his constitutional rights. (See Respondent's Brief p.21 n.10) This is the first time standing has been raised as an issue.

It is now well established that before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon. Matters not raised in the trial court are deemed waived and cannot be raised for the first time on appeal. Salt Lake County v. Carlston, 776 P.2d

653 (Utah App. 1989) In this case because the State raises standing for the first time on appeal, the Court should refuse to consider the issue and the objection should be deemed waived.

B. Defendant had standing to assert his Fourth Amendment rights.

Even if the Court decides to consider the standing issue, Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), supports the conclusion that defendant had standing.

Rakas involved whether individuals who moved to suppress evidence seized from an automobile that was searched as a getaway vehicle in a robbery. Because the defendants claimed no ownership interest in the automobile or the items seized the Supreme Court held that they lacked standing to assert a violation of Fourth Amendment rights. Id. at 439 U.S. at 150, 58 L.Ed.2d at 405.

In discussing the proper standard for non-owner standing, the Court modified its previous standard of "legitimately on the premises" as per Jones v. United States, 362 U.S. 257, 80 S.Ct. 125, 4 L.Ed.2d 697 (1960). The Court did not modify or overrule the holding of Jones. In Jones the Court allowed an individual who was present at the time of a

friend's apartment to object to the search. The friend had given Jones a key to it, with which Jones admitted himself on the day of the search.

Although the Court modified the "legitimately on the premises" of Jones, standard as too broad, the Court also stated:

> We do not question the conclusion of Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights.

In this case defendant was given permission to hold his birthday party at the Dinaland Aviation hanger by his father, the owner. It is quite clear that defendant was more than a one time occupant of the premises and therefore had a legitimate expectation of privacy in the premises. Defendant therefore had standing to challenge the legality of the officer's actions.

C. Bradshaw is dispositive on the issue of defendant's right to resist the officer's unlawful entry.

In State v. Bradshaw, 541 P.2d 800 (Utah 1975), this Court was clear in its pronouncement that a statute that made it a crime to resist an unlawful arrest is unconstitutional. The statute which was the subject of Bradshaw was the former Section 76-8-305 which read as follows:

> A person is guilty of a class B misdemeanor when he intentionally interferes with a person

> recognized to be a law enforcement official seeking to effect an arrest or detention of himself or another regardless of whether there is a legal basis for the arrest.

The State attempts to distinguish Bradshaw by stating that the language recognizing the right to resist an unlawful arrest is dicta. This argument fails for several reasons. First, the very language that concerned the Court most in Bradshaw was "regardless of whether there is a legal basis for the arrest." Bradshaw, 541 P.2d at 801. This is the very language that the State now argues this Court should amend back into the statute by judicial fiat. Indeed, the former statute is a restatement of the Elson rule that the State is now asking the Court to adopt. The Elson rule is stated as follows:

> A private citizen may not use force to resist a peaceful search by one he knows or has reason to believe is an authorized police officer performing his duties regardless of whether the search is ultimately determined to be illegal.

See Respondent's brief p.13

The similarity between the Elson rule and the former §76-8-305 compels the conclusion that Bradshaw is dispositive to the outcome of this appeal. Under Bradshaw defendant's conviction must be reversed. The only alternative is for this Court to overrule Bradshaw.

D. Bradshaw v. State is still good law.

The State is asking the Court to distinguish Bradshaw on the vagueness issue and to adopt the rule of Elson v. State, 659 P.2d 1195, 1200 (Alaska 1983). Bradshaw, however, is still good law and should not be modified.

The Bradshaw court's chief concern was based upon the factual background of the case. The defendant in Bradshaw was accosted by the officer for driving on suspension without first inquiring from the defendant whether or not he possessed a valid license. The defendant in fact did have a valid license in his possession. The defendant then left the scene of the initial stop and was followed by the officer who then attempted to arrest the defendant for resisting arrest. Id. at 800-801.

As noted in the opinion, the officer's illegal conduct precipitated the confrontation that eventually led to an innocent citizen's arrest. Id. at 803 (J. Henroid concurring) Had the officer acted as he was trained to act, the defendant would never have been put in jeopardy for resisting.

The right to use force to resist an unlawful search or arrest has long been recognized at common law. Regina v. Tooley, 2 Ld. Raymond Rep. 1296, 1301 (QB 1709), Bad Elk v.

United States, 177 U.S. 529, 20 S.Ct. 729, 44 L.Ed. 874 (1900). Although several jurisdictions have abrogated the right for expediency purposes, defendant disputes the State's statement that the "modern view" abrogating the right has been adopted by a clear majority of states. See Annot. 44 ALR3d 1078 (1972).

In Brown v. City of Oklahoma City, 721 P.2d 1346 (Ok App. 1986), the State of Oklahoma argued virtually the same position that is advanced by the State in this case. In summary up the State's argument the Court stated:

> Various reasons have been advanced for limiting the common law right of resistance but the principal hypothesis is that force begates force, as one court put it, and "violence is not only invited but can be expected," as another court stated it. (Citations omitted)

721 P.2d at 1346. Rejecting the argument, the Court stated:

> We do not, however, think this type of reasoning is sound. The existence of a right to resist should not depend on whether it is prudent for the individual to exercise it. If the law enforcement officer is engaged in the commission of a crime or is trespassing on one's person or property, it makes no sense to us that the rights of the victim of such unlawful acts should be less than those he has if the wrongdoer is not a police officer.

Id.

> . . . The principal we embrace, however, is one that reaches a rational compromise between competing interests - one that does not exalt unlawful police authority over individual rights. For in the final analysis if our government is to be in fact what we continually proclaim it to be in theory - one of laws and not men - The freedom to refuse to obey a paternity unlawful order of a police officer and the freedom to resist his trespasses, his unlawful efforts to seize property and effect illegal arrest is fundamental and must remain involate.

Id. at 1352

The Oklahoma Court of Appeals decision is in line with several U.S. Supreme Court decisions. As stated in Frank v. State of Maryland, 359 U.S. 360, 364, 79 S.Ct. 804, 807, 3 L.Ed.2d 877 (1959):

> [T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under property authority of law. The second, and intimately related protection, is self protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual. (Emphasis added.)

See also Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349, 355 (1963) (saying "obviously, however, one cannot be punished for failure to obey a police officer if that command is itself violative of the constitution.")

In the case at hand the State has failed to provide sufficient justification for modifying or limiting the holding of Bradshaw. Any move toward the Elson rule would necessarily impinge upon every citizens constitutional rights and would actually encourage sloppy, heavy handed police tactics.

In this case it was the officer's heavy handed method of shoving his way into the Dinaland Aviation hanger without first issuing a verbal warning that led to the confrontation. (Trial Court's Findings of Fact 11 & 12) Chad Gardiner did what many citizens would do when shoved after asking if the officer had a warrant, he physically resisted. Should he now be punished even though his only alleged crime was to resist what is conceded to be an unlawful, warrantless search? Bradshaw and the better reasoned cases answer the question with a resounding no. When police officers are allowed to act illegally and thereby goad an otherwise law abiding citizen into a confrontation that subjects the citizen to punishment under the criminal law, individual rights take a back seat to considerations of expediency and convenience. Although no one wishes to encourage physical resistance to illegal actions of police officers, innocent citizens should not be subject to criminal sanction for standing up for their constitutional rights.

POINT II

THE OFFICER'S USE OF UNNECESSARY FORCE REOUIRES ACQUITTAL EVEN UNDER THE ELSON RULE.

The State argues in its brief that defendant failed to establish or present evidence as to how the officer used excessive or unnecessary force. Defendant will not belabor the issue by once again citing the relevant portions of the record but would point out to the Court the following factors:

First, the officer never gave defendant a verbal warning to move out of the way before shoving the defendant with such force as to knock him over a table. Second, prior to being shoved, the defendant did not take any physical action against the officer. Finally, by all witnesses accounts it was the officer who used force first after a peaceful request by the defendant that the officer produce a warrant.

The issue of unnecessary force is both a factual and legal issue. The Utah Code of Criminal Procedure spells out when an officer may use force to effectuate an arrest. U.C.A. §77-7-7 provides:

> If a person is being arrested and flees or forcibly resists after being informed of the intention to make the arrest, the person arresting may use reasonable force to effect the arrest.

U.C.A. §77-7-6 provides:

> Manner of making arrests: The person making the arrest shall inform the person being arrested of his intention, cause and authority to arrest him.

The statute lists exceptions which do not apply in this case. It is imperative to note that both statutory section require that a person being arrested receive a verbal notice or warning before force is allowed. There is nothing in the record to support the officers resorting to force without first giving the defendant verbal notice to step aside or face arrest. Because the officer used force before it was necessary, the use of force was therefore unnecessary within the meaning of Elson v. State, supra, and defendant should be acquitted.

CONCLUSION

For the above reasons the defendant respectfully requests that the Court reverse the decision of the Court of Appeals and remand to the trial court with instructions to acquit defendant.

DATED this 5th day of March, 1990.

McRAE & DeLAND

HARRY H. SOUVALL
Attorney for Appellant

CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, four (4) true and correct copies of the foregoing Reply Brief of Appellant to Paul Van Dam, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 on this 5th day of March, 1990.

Harry H. Souvall

PART 3

OBSTRUCTING GOVERNMENTAL OPERATIONS

76-8-301. Interference with public servant.

Constitutionality.
This section is not unconstitutionally vague.
State v. Theobald, 645 P.2d 50 (Utah 1982).

76-8-305. Interference with peace officer making lawful arrest.

A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care, should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of himself or another and interferes with such arrest or detention by use of force or by use of any weapon.

History: C. 1953, 76-8-305, enacted by L. 1981, ch. 62, § 1.
Compiler's Notes. — Laws 1981, ch. 62, § 1 repealed old § 76-8-305 (L. 1973, ch. 196, § 76-8-305), relating to interference with law enforcement official seeking to detain interferor or another, and enacted new § 76-8-305.

76-8-306. Obstructing justice.

(1) A person is guilty of an offense if, with intent to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he:

(a) knowing an offense has been committed, conceals it from a magistrate;

(b) harbors or conceals the offender;

(c) provides the offender a weapon, transportation, disguise, or other means for avoiding discovery or apprehension;

(d) warns the offender of impending discovery or apprehension;

(e) conceals, destroys, or alters any physical evidence that might aid in the discovery, apprehension, or conviction of the person;

(f) obstructs by force, intimidation, or deception anyone from performing an act that might aid in the discovery, apprehension, prosecution, or conviction of the person; or

(g) having knowledge that a law enforcement officer has been authorized or has applied for authorization under either Section 77-23a-10 or 77-23a-15 to intercept a wire, electronic, or oral communication, gives notice or attempts to give notice of the possible interception to any person.

(2) An offense under Subsection (1)(a) through (f) is a class B misdemeanor, unless the actor knows that the offender committed a capital offense or a felony of the first degree, in which case it is a second degree felony.

of an emergency, when probable cause exists, a magistrate may orally authorize a peace officer to arrest a person for a public offense, and thereafter, as soon as practical, an information shall be filed against the person arrested.

History: C. 1953, 77-7-4, enacted by L. 1980, ch. 15, § 2.

Cross-References.
Assault in presence of magistrate, 77-3-10.

77-7-5. Issuance of warrant — Time arrests may be made. A magistrate may issue a warrant for arrest upon finding probable cause to believe that the person to be arrested has committed a public offense. If the offense charged is:

(1) A felony, the arrest upon a warrant may be made at any time of the day or night; or

(2) A misdemeanor, the arrest upon a warrant can be made at night only if the magistrate has endorsed authorization to do so on the warrant.

History: C. 1953, 77-7-5, enacted by L. 1980, ch. 15, § 2.

Collateral References.
Arrest ⇐ 67.

6A CJS Arrest § 51.
5 AmJur 2d 765, Arrest § 79.
Time at which an arrest is made as affecting its legality or liability for making it, 9 ALR 1350.

77-7-6. Manner of making arrest. The person making the arrest shall inform the person being arrested of his intention, cause and authority to arrest him. Such notice shall not be required when:

(1) There is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;

(2) The person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or

(3) The person being arrested is pursued immediately after the commission of an offense or an escape.

History: C. 1953, 77-7-6, enacted by L. 1980, ch. 15, § 2.

Cross-References.
Dogs used in law enforcement, immunity from liability for injury by, 18-1-1.

Collateral References.
Arrest ⇐ 68.
6A CJS Arrest §§ 45, 47, 48.
5 AmJur 2d 755-759, Arrest §§ 69-72.

DECISIONS UNDER FORMER LAW

How arrest may be made.
Private persons were not required to give notice of their intention to arrest defendant and his confederate in crime, where latter, when first seen, were engaged in commission of criminal act. People v. Coughlin (1896) 12 U 58, 44 P 94.

Where facts showing commission of robbery were related to sheriff's posse, members thereof, although private citizens and nonresidents of county, could follow, and capture by use of such force as necessary, persons who committed robbery. State v. Morgan (1900) 22 U 162, 61 P 527.

77-7-7. Force in making arrest. If a person is being arrested and flees or forcibly resists after being informed of the intention to make the arrest,

the person arresting may use reasonable force to effect the arrest. Deadly force may be used only as provided in section 76-2-404.

History: C. 1953, 77-7-7, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Force which peace officer may use in making arrest, 76-2-404.

Collateral References.

Arrest ⇐ 68.

6A CJS Arrest § 49.

5 AmJur 2d 766-773, Arrest §§ 80-85.

Deadly force in attempting to arrest fleeing felon, right of peace officer to use, 83 ALR 3d 174.

Degree of force that may be employed in arresting one charged with a misdemeanor, 42 ALR 1200.

Dispute over custody as affecting charge of obstructing or resisting arrest, 3 ALR 1290.

Excessive force used in accomplishing lawful arrest, right to resist, 77 ALR 3d 281.

Peace officer's liability for death or personal injuries caused by intentional force in arresting misdemeanant, 83 ALR 3d 238.

What constitutes offense of obstructing or resisting officer, 48 ALR 746.

DECISIONS UNDER FORMER LAW

Applicability.

Former statute applied to a constable serving a writ of restitution for premises. Marks v. Sullivan (1893) 9 U 12, 33 P 224, applying 2 Comp. Laws 1888, § 4861.

77-7-8. Doors and windows may be broken, when. To make an arrest, a private person, if the offense is a felony, and in all cases, a peace officer, may break the door or window of the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before breaking under the exceptions in section 77-7-6 or where there is reason to believe evidence will be secreted or destroyed.

History: C. 1953, 77-7-8, enacted by L. 1980, ch. 15, § 2.

Collateral References.

Arrest ⇐ 68.

6A CJS Arrest §§ 54-56.

5 AmJur 2d 774-778, Arrest §§ 86-93.

Police officer's power to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor, 76 ALR 2d 1432.

DECISIONS UNDER FORMER LAW

Felony in progress.

Officers could break open doors of building at night where they had reasonable grounds to believe a felony was being committed therein, and assault with deadly weapon upon officer was not justifiable, even though he did not first demand admittance and explain his purpose. State v. Williams (1917) 49 U 320, 163 P 1104.

77-7-9. Weapons may be taken from prisoner. Any person making an arrest may seize from the person arrested all weapons which he may have on or about his person.

History: C. 1953, 77-7-9, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Property taken from arrested person, receipt for, 77-24-5.